IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL MISCELLANEOUS APPLICATION NO. 139 OF 2002
WITH CRIMINAL APPEAL NO. 48 OF 2002

Anil Madgavkar,
major, occupation business,
r/o H. No.82,
Mae de Deu wado,
Sangolda, Bardez, Goa. ... Applicant.

Versus

1. Suresh P. Namshikar,
major, r/o Sonarbhat,
Opp. Dessai Saw Mill,
Reis Magos, Bardez,
Goa, and

2. S T A T E,
through Public Prosecutor. ... Respondents.

Shri A. D. Bhobe, advocate for the applicant.

Shri A. P. Lawande, Public Prosecutor for respondent no.2.

CORAM: P. V. KAKADE, J.

DATE: 21st November, 2002.

ORAL ORDER

Heard Shri Bhobe, learned counsel for the applicant. None present for respondent no.1, though notice was duly served upon him with specific direction that the matter shall be finally adjudicated at the stage of admission.

Leave to appeal granted. The proceedings are taken up for final hearing immediately.

2. In this application, the order passed by the J.M.F.C., Mapusa, dated 15th September, 2002, acquitting

the accused person in a private complaint for offences under Sections 447 and 427 of the Indian Penal Code and under Section 256 of the Criminal Procedure Code, is challenged. The brief facts are that the applicant filed a private criminal case No.23 of 2002/II in the Court of J.M.F.C., Mapusa, against respondent no.1. There was some dispute pertaining to the compound wall between the parties. The criminal complaint was for commission of the offences under Section 427 and 441 of the Indian Penal Code. The case was duly fixed for verification and on 13th February, 2002, the statement of the applicant under Section 200 of the Code of Criminal Procedure was recorded by the Magistrate and the case was further adjourned on various occasions. Thereafter, the statement of the applicant's witness was recorded under Section 200 of the Code of Criminal Procedure when his advocate was present and the learned J.M.F.C. issued process against respondent no.1 for commission of the offences and the matter was fixed for appearance of the respondent in due course. Respondent no.1 filed his appearance and furnished a personal bond with one surety. The plea of the respondent no.1 was also recorded and the case was fixed for trial on 16th April, 2002. Thereafter the case was adjourned from time-to-time, but not at the request of the applicant. On 26th June, 2002, the deposition of the applicant was partly recorded and the matter was adjourned to the next date on which date the cross-examination of the applicant was

partly recorded and then it was again adjourned. On the next date the cross-examination was completed, but the matter came to be adjourned on various occasions. On 3rd September, 2002, the deposition of the applicant's witness was partly recorded and the matter was then adjourned for further examination of the said witness and the next date was fixed on 18th September, 2002. On that day, the advocate appearing for the applicant was in personal difficulty and, therefore, asked the applicant to appear before the learned Magistrate and seek adjournment. Accordingly, the applicant remained present on that day to seek adjournment of the case. However, he came to know that at 10.30 a.m. the case was called out and when neither the applicant nor his advocate was present, the case was disposed of under the provisions of Section 256 of the Code of Criminal Procedure.

3. If we peruse the scheme of Section 256 of the Code of Criminal Procedure, it is quite clear that normally it has to be invoked for non-appearance or death of the complainant. However, it would be neither proper, nor just to invoke such provision when the evidence is partly recorded and the matter is fixed for recording of further evidence. This was especially so when the applicant was present before the Court at 2.30 p.m. on 18th September, 2002 and then he came to know that the matter was called out at 10.30 a.m. and was disposed of under Section 236 of

the Code of Criminal Procedure and consequently, the accused was acquitted.

In my considered view, in doing so the learned Magistrate has fallen in error and has missed the letter and spirit of the provisions of Section 256 of the Code of Criminal Procedure. At least he should have waited till the end of the day before passing the Order under Section 256 of the Code of Criminal Procedure and there was no need to pass such order in a haste at 10.30 a.m. itself. In short, I am satisfied that the order cannot be sustained in law and, therefore, has to be set aside.

4. Hence, the Criminal Miscellaneous Application and the Criminal Appeal are allowed. The Order dated 18th September, 2002 passed under Section 256 of the Code of Criminal Procedure passed by the J.M.F.C., Mapusa, is hereby set aside. It is further directed that the proceedings shall be taken up for hearing from the point of recording of evidence of the witness of the applicant, which was in progress on the date when the Order was passed. The applicant is directed to appear before the J.M.F.C., Mapusa, to get the date fixed for the said purpose. Both the Criminal Miscellaneous Application and Criminal Appeal stand disposed of.

P. V. KAKADE, J.